89-1724 NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CELEBRITY WORLD, INC. and JOHN LEDES,

Petitioners,

v.

CELEBRITY SERVICE INTERNATIONAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD I. SCHULDENFREI
Attorney for Petitioners
441 Lexington Avenue
Suite 409
New York, New York 10017
(212) 286-9460

QUESTIONS PRESENTED

1. Whether an award, trebled, under section 35 of the Lanham Trademark Act (15 U.S.C. § 1117(a)) of lost or diverted sales is punitive without proof of actual lost sales or income proximately related to the infringing activity?

2. If so, whether the Lanham Trademark Act (15 U.S.C. § 1117(a)) authorizes a punitive award for willful infringement of a registered trademark?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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OPINIONS BELOW

The summary opinion of the court of appeals below is reprinted as Appendix A. The summary order of the court of appeals denying rehearing is

reprinted as Appendix B.

JURISDICTION

The decision of the court of appeals was entered on December 6, 1989. A timely application for rehearing was denied by order of February 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2. 15 U.S.C. § 1117(a)[1] provides:

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[1] Cf. The Trademark Law Revision Act of 1988. Public Law 100-667, 102 Stat

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits

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3935 (Enacted November 16, 1988 and effective November 16, 1989. (The Act specifically adds to the provision a reference covering violations of 15 U.S.C. § 1125(a) (unfair competition)).

> is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party. [Emphasis added].

STATEMENT OF THE CASE

Petitioner John Ledes ("Ledes") organized Celebrity World, Inc. ("Celebrity World"), defendants below, in 1985 to publish a newsletter and offer information about celebrities, after his failed attempt at acquiring, among other things, the marks CELEBRITY SERVICE, CELEBRITY BULLETIN AND CELEBRITY REGISTER from Respondent's predecessor. He titled the newsletter Celebrity World News, adopted the mark CELEBRITY WORLD NEWS and the tradename "CELEBRITY WORLD."

In 1986, Respondent (plaintiff below), Celebrity Service International, Inc. ("Celebrity Service"), sued Ledes and Celebrity World[2] alleging, that use of "Celebrity World" and "CELEBRITY WORLD NEWS" violated the Trademark Act (15 U.S.C. § 1051 et seq.)[3]; that Ledes and Celebrity World misappropriated and stole its trade secrets, defamed it, and tortiously interfered with its business relations. CELEBRITY SERVICE and CELEBRITY BULLETIN were plaintiff's federally registered marks.

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[2]Claims against two other defendants were dismissed with prejudice and concluded in judgment, respectively.

[3]Specifically, 15 U.S.C. § 1114(1) and 15 U.S.C. § 1125(a).

After a six day bench trial, the trial judge ruled on July 29, 1987 for Celebrity Service on all counts and referred the case to a magistrate for an accounting of profits and a hearing on damages. The trial court held that Ledes' conduct towards Celebrity Service was deliberate, malicious, willful, contumacious, and it held him liable, personally, for the compensatory damages and a concurrent award of punitive damages.

Ledes and Celebrity World raise, only, the issue that Celebrity Service's monetary award for infringement and unfair competition under the Lanham Act, specifically 15 U.S.C. § 1117(a), was punitive, not compensatory, and punitive awards under 15 U.S.C. § 1117(a) are

prohibited. Other monetary awards made by the trial court are uncontested here.

During the six day trial of this lawsuit, Celebrity Service offered no probative evidence that Ledes' and Celebrity World's infringing activities actually damaged its own business activities, and, in its post-trial formal additional findings of fact and conclusions of law, the trial court ordered that "Given the willful, wanton and fraudulent nature of Mr. Ledes (sic) conduct, such damages as are found hereafter are to be trebled."[4] Emphasis added.

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[4] See Appendix C, which includes a reproduction of conclusion 95 at p. 45 of The Court's Additional Findings of Fact and Conclusions of Law.

Celebrity Service established, however, that Celebrity World covertly subscribed to its CELEBRITY BULLETIN newsletter and CELEBRITY SERVICE information service and used that information to service its CELEBRITY WORLD NEWS subscribers, and the trial court concluded that "Celebrity Service has been damaged by defendants' misuse of its Celebrity Service subscriptions. With a single year and a half subscription to Celebrity Service, Celebrity World was able to service the needs of its own 40 plus subscribers; subscribers who would have otherwise subscribed to Celebrity Service in order to receive goods and services of the same nature. Defendants have thus directly diverted profits from Celebrity Service and

damaged plaintiff."[5]

After a three day evidentiary hearing, the Magistrate found that "during the period of its operation, defendant Celebrity World had 52 subscribers who were not subscribers of the plaintiff and it was these subscribers that provided Celebrity World with revenues from subscriptions of $53,473."[6] At Celebrity Service's higher subscription rates, the figure translates into lost revenues of $82,915. The accounting showed that Celebrity World had losses, not

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[5] Appendix C, reproduction of conclusion 63 at p. 33 of The Court's Additional Findings of Fact and Conclusions of Law.

[6] See Appendix D, which reproduces the portions of the magistrate's Report and Recommendation which are pertinent to this petition.

profits, and a negative net worth.

Based on the live and documentary evidence presented at the hearing, the magistrate concluded that "[N]o evidence was presented at the evidentiary hearing over which I presided which would support the conclusion that, but for the defendant Celebrity World's act of infringement, all 52 of its subscribers would have subscribed to the plaintiff, in spite of the plaintiff's higher subscription rates and the presence of other competitors, however inferior their services may have been... . Neither was any such evidence introduced at the trial before Your Honor brought to my attention. In fact, none of the

individual subscribers were produced by either party to testify as to their own motivations for subscribing to defendant Celebrity World."

Bound, however, by the trial court's conclusion, the magistrate found $82,915 as the basis of the monetary award for Celebrity Service's damages from trademark infringement, and, as the trial court directed that such damages were to be trebled pursuant to 15 U.S.C. § 1117, the magistrate recommended $248,745 as Celebrity Service's damages from trademark infringement.

The trial court, however, did "not share the Magistrate's hesitancy in translating the fifty-two subscribers who went to defendant into damages to plaintiff." The court

explained, also, that "Plaintiff alone could have performed the service these subscribers sought had not Ledes deliberately misappropriated plaintiff's employees and lists, and defamed plaintiff. Therefore, clearly there is a sufficient basis to make 'an educated computation of damages....' Lexington Products, Ltd. v. B.D. Communications, 677 F. 2d 251,254 (2d Cir. 1982)."[7]

Ledes and Celebrity World appealed, among other things, from the district court's damage award of $248,745 assessed for trademark infringement and unfair competition. The court of appeals did not agree that this damage award was incorrect.

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[7] See Appendix E, Endorsed Memorandum dated October 27, 1988.

It held that "The district court heard testimony from a number of witnesses, including Ledes. After trial, the district court made extensive, written findings of fact. We are not inclined to overrule these findings, particulary since so many flow from the district court's assessment of the credibility of Ledes and other witnesses. In this regard, we note that the district court found that Ledes repeatedly lied under oath."[8] Ledes and Celebrity World petitioned for rehearing, pointing out that (a) the record and magistrate's hearing were devoid of probative evidence that Celebrity World's subscribers would have subscribed to

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[8] See Appendix A.

Celebrity Service for similar goods and services, but for Celebrity World's acts of infringement and unfair competition; (b) only actual damages should be awarded and trebled under § 35 of the Lanham Act (15 U.S.C. § 1117(a)); (c) Celebrity Service had the burden under § 35 of the Lanham Act (15 U.S.C. § 1117(a)) of proving actual damages; it proved none and was not entitled to any assessment under § 35 of the Lanham Act; (d) an award under § 35 of the Lanham Act without proof of actual damages was an assessment of punitive damages; (e) whether or not Ledes lied under oath has no bearing on the plain meaning of the language of § 35 of the Lanham Act and Celebrity Service did not rely on Ledes' testimony to prove

its damages and Celebrity World did not benefit from its own or Ledes' misconduct. Nonetheless, the Second Circuit Court of Appeals denied the application for rehearing, and this petition followed it.

REASONS FOR GRANTING THE WRIT

I. Without Evidence to Support the Conclusion That But For Celebrity World's Acts of Infringement, All 52 of Its Subscribers Would Have Subscribed to Celebrity Service, in Spite of the Plaintiff's Higher Subscription Rates and the Presence of Other Competitors, However Inferior Their Services May Have Been, the Sum Assessed, and Trebled By the Court, Under 15 U.S.C. § 1117(a) Was Punitive.

The fundamental statutory issue posed by this petition is the discretion of the trial court to assess damages under 35 U.S.C. § 1117(a) when none, proximately related to the infringing activities, are proved. A magistrate found "no evidence" of monetary damage and the court of appeals refused to review the record because the trial court found that Ledes lied under oath, and misappropriated trade secrets.

The threshold question is whether

an assessment of damages for diverted profits under 15 U.S.C. § 1117(a) is punitive where the record is devoid of evidence that the infringer's conduct diverted any sale. Restated, the statutory issue is whether 15 U.S.C. § 1117(a) authorizes such a punitive award.

Legislative history supports the proposition that the intent of 15 U.S.C. § 1117(a) is to compensate a registered trademark owner for his actual injury. It also provides some support for the corollary that an assessment of lost profits without proof of diversion is punitive and such punitive awards were unintended. More specifically, during 1941 House Hearings on the statute, the following exchange occurred among Messrs. Pohl,

Rogers and Lanham:[9]

> Mr. Pohl: Mr. Chairman, the defendant does a certain amount of business, and sometimes he does it unprofitably, and only that sort of provision is sought to be reached by this, could not the sum have some relation to the extent of the defendant's sales, for instance, inserting, the court may in its discretion enter judgment for such sum, having regard to the extent of the defendant's sales?
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> * * *
>
> Mr. Rogers: You are going to have

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[9] Hearings on H.R.102, H.R.5461, and S895 Before the Subcomm. on Trademarks of the House Comm. on Patents, 77th Cong., 1st Sess. 205 (1941).

a penalty there, and you do not want to do it.

* * *

Mr. Lanham: It seems to me for the present, until we see how that operates, it might be well to put that in, such sum as profits as the courts will find.

* * *

This Court denied monetary relief to a registered trademark owner under the Trademark Act of 1905 where he produced no evidence of significant injury to himself or benefit to the infringer from the infringement.[10] While the Lanham Act or Trademark Act

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[10] Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 67 S.Ct. 1136 (1947).

of 1946[11] succeeded the Trademark Act of 1905[12], § 35 of the Lanham Act, 15 U.S.C. § 1117(a), incorporated § 16 from the 1905 Act, 33 Stat. 728 (remedy at law for registered trademark infringement), and § 19, 33 Stat. 729 (remedy in equity). Section 35 of the Lanham Act echoes these earlier recovery provisions.[13]

In Champion Spark Plug Co., there was no showing of fraudulent conduct, palming off, bad faith, or deliberate intent on the part of the defendant to cause confusion; but other courts have

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[11] Pub.L.No.79-489, 60 Stat.427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1982 & Supp. IV 1986)).

[12] Pub. L. 58-84, 33 Stat. 724 (1905) (1905 Act).

[13] Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F. 2d 103,109 (2d Cir. 1988).

required evidence of actual damage or actual profit in dollars and cents to justify a monetary award under 15 U.S.C. § 1117(a) despite the defendant's conduct or intent.[14]

In Caesar's World, Inc., 520 F.2d at 273, the court held that a "compensatory" assessment of $1,000 under 15 U.S.C. § 1117(a) without evidence of actual damage to the registered trademark owner was merely punitive, stating that:

> No evidence was offered showing any damage to the plaintiffs.

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[14] See, e.g., Caesar's World, Inc. v. Venus Lounge, Inc., 520 F.2d 269 (3d Cir. 1975); Jones Apparel Group, Inc. v. Steinman, 466 F. Supp. 560 (E.D. Pa. 1979); Electronics Corp. of America v. Honeywell, Inc., 358 F. Supp. 1230 (D. Mass. 1973), aff'd per curiam 487 F. 2d 513 (1st Cir. 1973), cert. denied 415 U.S. 960 (1974).

> The only evidence offered, aside from the accountant's testimony, was that of Michael Falcone, defendant's president, and that tended to prove willfulness of the infringement, not damages suffered by the plaintiffs. Thus the award of $1,000.00 in compensatory damages has no evidentiary support and must be set aside.
>
> * * *

When 15 U.S.C. § 1117(a) was applied to the punitive award, the court found that:

> Section 35 also provides that "[i]n assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount

> found as actual damages, not exceeding three times such amount." This sentence cannot be relied upon to sustain either the award of compensatory damages or the award of exemplary damages, since it assumes an evidentiary basis for the award of some actual damages. We have found none. Three times zero is zero.

* * *

The registered trademark owner has the burden of adducing at least some probative evidence that the wrongdoer's conduct actually damaged him. In Electronic Corporation of America, 358 F. Supp. at 1233-34, a case arising under 15 U.S.C. § 1125(a) (the unfair competition section of the

Lanham Act), the court denied any award of profits or damages unless the plaintiff first demonstrated that he had suffered "actual harm." The court relied on the "compensation and not a penalty" clause in 15 U.S.C. § 1117(a):

> ...Congress deliberately chose to limit the discretion of federal courts in awarding money judgments in Lanham Act cases. Unless there is some evidence of harm arising from defendant's violation, a court may not award a money judgment based on profits or damages. Were the section to be read differently there would be a great danger that money judgments would be, in essence, punishments; but it is apparent

> from the section's conclusion that money judgments shall constitute compensation and not a penalty.[15]
>
> * * *

The court went on to state that "the nature of the defendant's conduct would qualify as an equitable consideration" cognizable under 15 U.S.C. § 1117(a) in assessing a money award after proof of actual injury. The actual damages proved must flow from the infringer's sales.[16] In

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[15] Accord, Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F. 2d 154,162 (1st Cir. 1977) (refusing to allow a trademark licensee to recover under 15 U.S.C. § 1125(a) because the licensee failed to show any actual harm to his business, citing Electronics Corporation of America).

[16] See, Invicta Plastics (USA) Ltd. v. Mego Corp., 523 F. Supp. 619 (S.D.N.Y. 1981); Vuitton Et Fils, S.A. v. Crown

Invicta Plastics (USA) Ltd., 523 Supp. at 624, the court stated that:

> ...Damage awards for lost sales and profits may not be based upon the assumption that a trademark infringement resulted in commercial injury. See, Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F. 2d 154 (1st Cir. 1977); Grotrian et al. v. Steinway & Sons, 523 F. 2d 1331 (2d Cir. 1975); Caesar's World, Inc. v. Venus Lounge, Inc., 520 F. 2d 269 (3d Cir. 1975).[17]

Handbags, 492 F. Supp. 1071 (S.D.N.Y. 1979).

[17] But see Monsanto Chemical Co. v. Perfect Fit Mfg. Co., Inc., 349 F. 2d 389,396 (2d Cir. 1965), holding that:

> ...[I]t seems obvious that there must have been some economic injury to Monsanto, such as loss of

Unlike Monsanto[18], Celebrity Service had several competitors in addition to Celebrity World, which sold similar services at lower prices, including Celebrity World. No evidence was adduced, in this case, to show that any Celebrity World subscriber would have bought Celebrity Service's more expensive service had the infringement and other acts of misconduct not occurred. Historic perspective suggests that a money award without that showing is punitive, not compensatory.[19]

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sales to legitimate producers and the loss of the good-will of some of the retail purchasers of Perfect Fit's inferior "Acrilan" mattress pads.

[18] Supra note 17.

[19] See, Leather Cloth Co. v. Hirschfield, LR 1 Eq. 299,301-302 (VC 1865).

The facts establish that the damages assessed in the amount of $248,745 are not based upon evidence in the record. Analysis of the statute, its intent, legislative history and case law establishes that such a money award is punitive because it does not compensate the registered trademark owner for any identifiable item of actual damage. This Court has not ruled whether punitive damages may be imposed against a trademark infringer under 15 U.S.C. § 1117(a).

II. 15 U.S.C. § 1117(a) Does Not Authorize An Additional Award of Punitive Damages For Willful Infringement of a Registered Trademark.

Any discussion of the availability of punitive damages under 15 U.S.C. § 1117(a) must begin with this Court's decision in Fleischmann

Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S. Ct. 1404 (1967). In Fleischmann, this Court ruled that federal courts lacked power to award reasonable attorney fees, although the plaintiff established deliberate infringement of its trademark because at that time 15 U.S.C. § 1117(a) did not enumerate such an award. Id. at 721, 87 S. Ct. at 1408. Arriving at its holding, this Court said:

> ...When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. (citations omitted)...[S]everal attempts to introduce such a provision into the Lanham Act have failed

> of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context.

Id. at 721

Other courts have applied the reasoning of Fleischmann to bar a separate recovery of punitive damages for infringement. Reviewing relevant case law on the issue of punitive damages recently, the Second Circuit in Getty Petroleum Corp., 858 F. 2d at 112-13, offered a current analysis:

> Decisions from sister circuits

support the view that Fleischmann bars an award of punitive damages under § 35. See, Metric & Multistandard Components Corp. v. Metric's, Inc., 635 F. 2d 710, 715-16 (8th Cir. 1980) (rejecting plaintiff's arguments for common law remedies for violations of § 43(a) of the Lanham Act: Fleischmann is "broad enough to suggest that section 35 is the exclusive provision for monetary damages for the entire Act"); Electronics Corp. v. Honeywell, Inc., 487 F. 2d 513 (1st Cir. 1973) (per curiam) (upholding district court holding that plaintiff not entitled to punitive damages under the Lanham Act based on

> Fleischmann, its reading of § 35, and the absence of judicial authority for such award), aff'g 358 F. Supp. 1230 (D. Mass. 1973), cert.denied, 415 U.S. 960, 94 S. Ct. 1491, 39 L.Ed.2d 575 (1974); see also Caesar's World, Inc. v. Venus Lounge, Inc., 520 F.2d 269,274 (3d Cir. 1975) (striking an award of punitive damages in reliance on district court's holding in Electronics).

* * *

In concluding its discussion, the court of appeals held that "§ 35 of the Lanham Act does not authorize an additional award of punitive damages for willful infringement of a registered trademark. So long as its purpose is to compensate a plaintiff

for its actual injuries - even though the award is designed to deter wrongful conduct - the Lanham Act remains remedial." Emphasis added. Getty Petroleum Corp., 858 F. 2d at 113.

The assessment under 15 U.S.C. § 1117(a) against Ledes and Celebrity World should not stand, provided this Court adopts the holding of the Second Circuit Court of Appeals in Getty Petroleum Corp. and these cases it relies upon. The concern of the court of appeals that "such ruling should not be read as an incentive for deliberate trademark infringement," Id. at 113, is unwarranted in this case, because the district court made, and the court of appeals affirmed, discrete additional, cumulative

compensatory and punitive awards to deter future misconduct.[20]

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[20]See Appendix E.

CONCLUSION

The damages assessed against Ledes and Celebrity World under 15 U.S.C. § 1117(a) in the sum of $248,745 are punitive. Ledes and Celebrity World respectfully urge this Court to consider the important issue that mere punitive assessments under 15 U.S.C. § 1117(a) are prohibited.

Respectfully submitted,

Howard I. Schuldenfrei
Attorney for Petitioners
Suite 409
441 Lexington Avenue
New York, New York 10017
(212) 286-9460

APPENDIX A

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE WILFRED FEINBERG

HONORABLE THOMAS J. MESKILL
Circuit Judge

HONORABLE ALBERT W. COFFRIN
District Judge*

CELEBRITY SERVICE INTERNATIONAL, INC.,

Plaintiff-Appellee,

- against -

CELEBRITY WORLD, INC., et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. Defendants Celebrity World, Inc. and John Ledes appeal from a January 13, 1989 judgment of the United States District Court for the Southern District of New York, Richard Owen, J. The district court adopted the report and recommendation of Magistrate Naomi Reice Buchwald, dated

March 31, 1988, and awarded $458,962.95 in damages to plaintiff-appellee Celebrity Service International, Inc. The district court broke down this as follows: $248,745 for trademark infringement and unfair competition ($82,915 trebled); $13,002.35 for defamation; $15,000 for tortious interference with appellee's employment contracts; and $182,215.70 for appellee's attorneys fees, costs and disbursements. In addition, the district court assessed $100,000 in punitive damages against appellant Ledes, who is the President, Chairman of the Board of Directors and sole shareholder of Celebrity World.

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*Honorable Albert W. Coffrin, Senior United States District Judge for the District of Vermont, sitting by designation.

2. Appellants argue to us that the terms "Celebrity Bulletin," "Celebrity Service" and "Celebrity Register" are common descriptive terms that cannot be infringed, citing Reese Publishing Co. v. Hampton Int'l Communications, Inc., 620 F.2d 7 (2d Cir. 1980). However, appellee has registered the marks "Celebrity Service" and "Celebrity Bulletin," and has been attempting, over appellants' protests, to register "Celebrity Register." Appellee has also used all three marks for many years, well before appellants began to publish "Celebrity World News," and the district court found that the "marks have come to be widely recognized by the public as an indication of source." "If a mark has been

registered with the United States Patent and Trademark Office, the defendants in an infringement action do bear the burden of overcoming the presumption that the mark is not generic." ID. at 11; see also § 7(b) of the Lanham Trademark Act, 15 U.S.C. § 1057(b) (certificate of registration is "prima facie evidence" of validity of registered mark). In the district court, however, appellants simply raised the claim that the terms are descriptive in their answer to appellee's complaint, but then apparently did nothing in the district court to support the contention now made to us. Thus, we conclude that appellants have failed to carry their burden, and that, on the record before us, appellee's trademarks are valid.

3. Appellants also contest the district court's damage award for misappropriation and theft of trade secrets, which, although not accounted for separately, was part of the overall $248,745 assessed for trademark infringement and unfair competition. And they contend that the district court erred in assessing $13,002.35 for defamation and $15,000 for tortious interference with appellee's employment contracts. We do not agree that these damage awards were incorrect. The district court heard testimony from a number of witnesses, including Ledes. After trial, the district court made extensive, written findings of fact. We are not inclined to overrule these findings, particularly since so many

flow from the district court's assessment of the credibility of Ledes and other witnesses. In this regard, we note that the district court found that Ledes repeatedly lied under oath.

4. We have considered all of appellants' arguments, and they are without merit.

5. By order dated October 30, 1989, we directed appellee's counsel to file his brief by November 6, 1989 on pain of contempt. Although appellee's counsel failed to file his brief by the deadline, he moved on November 14 for, among other things, relief from that sanction and for permission to file his brief out of time. To the extent his November 14 motion seeks such relief, it is granted.

6. The judgment of the district court is affirmed.

ss/ WILFRED FEINBERG

ss/ THOMAS J. MESKILL

ss/ ALBERT W. COFFRIN

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States court of Appeals, in and for the Second Circuit, held at the United States Courthouse, one thousand nine hundred and ninety

Present: Hon. WILFRED FEINBERG,

Hon. THOMAS J. MESKILL,

Hon. ALBERT W. COFFIN, DJ*

CELEBRITY SERVICE INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

CELEBRITY WORLD, INC., JOHN LEDES, ANGELA WENDKOS and ERICA FURS, a/k/a ERICA KIRKLAND,

Defendants,

CELEBRITY WORLD, INC. and JOHN LEDES,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendants-appellants, Celebrity World, Inc. and John Ledes.

Upon consideration thereof, it is

ORDERED that said petition be and hereby is DENIED.

ss/ _____
ELAINE B. GOLDSMITH
Clerk

Senior District Judge for the District court of Vermont, Sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CELEBRITY SERVICE INTERNATIONAL, INC.,

Plaintiff,

v.

CELEBRITY WORLD, INC., JOHN LEDES, ANGELA WENDKOS and ERICA FURS a/k/a ERICA KIRKLAND,

Defendants.

THE COURT'S ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * *

63. Celebrity Service has been damaged by defendants' misuse of its Celebrity Service subscriptions. With a single year and a half subscription to Celebrity Service, Celebrity World was able to service the needs of its own 40 plus subscribers; subscribers who would have otherwise subscribed to

Celebrity Service in order to receive goods and services of the same nature. Defendants have thus directly diverted profits from Celebrity Service and damaged plaintiff.

* * *

95. Under Section 35 of the Lanham Act, 15 U.S.C. § 1117, the Court may treble the award of damages for trademark infringement and for violation of Section 43(a). Further, the Court may treble either compensatory damages or profits where the infringement was deliberate. Deering Milliken & Co. v. Gilbert, 269 F. 2d 191,194 (2d Cir. 1959). Such an award is left to the sound discretion of the district court. Id. Given the willful, wanton and fraudulent nature of Mr. Ledes conduct, ~~the Court~~ such damages as

are found hereafter are to be trebled ~~exercises its discretion in increasing the award of compensatory~~ damages to $480,000.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CELEBRITY SERVICE INTERNATIONAL, INC.

Plaintiff,

- against -

CELEBRITY WORLD, INC., JOHN LEDES, ANGELA WENDKOS and ERICA FURS, a/k/a ERICA KIRKLAND,

Defendants.

REPORT AND RECOMMENDATION

86 Civ. 8593 (RO)

TO THE HONORABLE RICHARD OWEN:

By Order, dated July 29, 1987, Your Honor referred this matter to me to determine the amount of the monetary award due plaintiff, including attorneys fees reasonably attributable to all aspects of this case, and for a determination of the assets of John Ledes and Celebrity

World, Inc. ("Celebrity World") to provide a basis for your assessment of punitive damages.

On July 29, 1987, Your Honor rendered a decision in favor of plaintiff, Celebrity Service International, Inc. ("Celebrity Service") against defendants, Celebrity World and John Ledes on all counts alleged in plaintiff's First Amended Complaint for trademark infringement, unfair competition, misappropriation, libel, theft of trade secrets and intentional interference with business relations. You awarded plaintiff the profits made by defendant, Celebrity World, the damages suffered by plaintiff as a result of defendants' unlawful acts, which damages shall be trebled:

punitive damages against defendants Celebrity World and John Ledes; costs, disbursements and actual attorneys' fees.

I held an evidentiary hearing on October 20 and 21 and November 12, 1987. On October 20 and 21, I heard testimony from Mr. Ted Venetoulis, Vice President and ten percent owner of plaintiff; Ms. Carol Schiff, an employee of plaintiff; Mr. Stephen Spector, a certified public accountant and partner in the firm of Kelton Spector and Company; Mr. Gary Goldberry, owner of Media Service, an entertainment research business; Ms. Rosalyn Starr, owner of a celebrity information and research service; and Mr. Neal Rosenberg, a certified public accountant and partner (as of November

1, 1987) in the firm of Goldstein, Golub, Kessler and Company. On November 12, I heard testimony from Mr. Spector, Ms. Schiff, and Mr. John Ledes, the individual defendant and President, Chairman of the Board and sole shareholder of Celebrity World, the corporate defendant.

Prior to the hearing, plaintiff submitted Proposed Findings of Fact dated October 9, 1987 (hereinafter, "Proposed Findings") and a Memorandum in Support, of the same date, and defendants submitted Proposed Findings of Fact dated October 9, 1987 and a Trial Memorandum of the same date. After the hearing, plaintiff submitted Supplemental Findings of Fact and Conclusions of Law dated December 10, 1987 (hereinafter, "Supplemental

Findings") and defendants submitted Proposed Findings of Fact dated December 10, 1987 and a Post-Hearing Memorandum of the same date. In response to my letter request, dated February 10, 1988, plaintiff submitted a letter response dated February 17, 1988 (hereinafter, "February 17 Letter") and defendants submitted a Supplemental Post-Hearing Request dated February 17, 1988. Based on the testimony and the exhibits relied on by the parties at the hearing, and the pre- and post-hearing submissions, I adopt the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Plaintiff's Damages

A. Trademark Infringement and Unfair Competition

1. Defendant Celebrity World operated in business from May 1, 1985

until late July 1987. Celebrity World published the first issue of its newsletter, CELEBRITY WORLD NEWS, in August 1985 (FF 21)[1] and ceased operation in late July 1987 due to Your Honor's injunction. (Hr. 334;[2] Nov. 12 Hr. 130; Def. Ex. II[3]). On July 30, 1987, Celebrity World notified its subscribers that it had ceased operations and would refund unearned portions of subscriptions. (Nov. 12 Hr. 131; Def. Ex. JJ).

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[1] "FF____" refers to the corresponding numbered Finding of Fact and "CL____" refers to the corresponding numbered Conclusion of Law from the Court's Additional Findings of Fact and Conclusions of Law dated July 31, 1987.

[2] "Hr____" and November 12 Hr____" refer, respectively, to the corresponding numbered page from the Transcript of the Damage Hearing on October 20 and 21, and to the Transcript of the Damage Hearing on

November 12 before me, since the two transcripts are not numbered sequentially.

[3] "Def. Ex.____" and "Pl. Ex.____" refer, respectively, to the corresponding defendants' exhibit and plaintiff's exhibit, received into evidence during the evidentiary hearing held before me.

2. Defendants' acts of trademark infringement and unfair competition were found by Your Honor to consist of the following: (a) the use by defendants of the marks CELEBRITY WORLD and CELEBRITY WORLD NEWS in such a manner as was likely to cause confusion (CL 43); (b) defendants' violation of the Lanham Act's prohibitions against false designation of origin (section 43(a)) (CL 51); (c) defendants' misrepresentations that information fraudulently obtained or stolen from plaintiff originated from defendants (CL 53); and (d) the false

description of defendants' products and services as superior to those sold and rendered by plaintiff, when in fact the information provided by defendants' products and services was misappropriated from plaintiff. (CL 54, 61-63).

3. During the period in which it conducted business, defendant Celebrity World made gross revenues from subscriptions in the amount of $53,473 ($5,483 for the period of May 1 to December 31, 1985; $29,951 for the year ended December 31, 1986; and $18,039 for the period from January 1 to July 31, 1987). (Def. Ex. O). If all of Celebrity World's subscribers had subscribed to Celebrity Service during that same period of time, Celebrity Service would have generated

income in the amount of $82,847.85. This calculation is based on the fact that in 1985-86, Celebrity Service's subscription rate was $1500 as compared to Celebrity World's rate of $1000, and in 1987 the respective rates were $1650 and $1000. No significant expenses would have been incurred by Celebrity Service as a result of this additional subscription income because the cost to Celebrity Service for servicing new subscribers is negligible. (Hr. 146).

4. There were and are competitors to Celebrity Service although the competitors who were witnesses at the hearing do not offer the same services as does Celebrity Service, nor are they as established as Celebrity Service. (Hr. 212,304,326,328; Nov.

12 Hr. 151-153; FF 5; Def. Exs. F,G,H,I.J,K,M and N).

5. During the period from April 1985 (four months prior to Celebrity World's first publication) to the date of trial in October 1987 (three months after Celebrity World ceased operation), fifty-two (52) of Celebrity World's subscribers were not subscribers to plaintiff. (Hr. 345-346; Def. Exs. Q and X).

* * *

CONCLUSIONS OF LAW

I. Plaintiff's Damages

A. Trademark Infringement and Unfair Competition

Your Honor has determined that as a result of the defendants' acts of infringement, the plaintiff is entitled to damages under Section 35

of the Lanham Act, 15 U.S.C. §1117.[6] (CL 89). This section provides that the prevailing plaintiff in a trademark infringement action is entitled to recover (1)

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[6] 15 U.S.C. §1117 provides:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the

> amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

defendants' profits, (2) any damages sustained by the plaintiff, and (3) the cost of the action. The recovery "is subject to the principles of equity." Bomar Instrument Corp. v. Continental Microsystems, Inc., 497 F. Supp 974,960 (S.D.N.Y. 1980) quoting Meaney v. Purdy, 29 N.Y. 2d 157, 160-61, 324 N.Y.S. 2da 47,49 (1971); Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F 2d 686 (2d Cir. 1970),

cert. denied, 403 U.S. 905 (1971). In this section, we consider the second element of recovery, damages sustained by the plaintiff.[7]

It is generally recognized that although section 35 of the Lanham Act allows for the recovery of monetary damages, a successful plaintiff is not in all cases entitled to "a monetary award in addition to injunctive relief." 2 McCarthy, Trademarks and Unfair Competition 514 (2d ed. 1984) (hereinafter "McCarthy"). The Second Circuit has stated that "a monetary award, whether in the form of damages or an accounting, is justified only to the extent that injury is shown to

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[7]We address defendants' profits in section II, infra, and costs of this action in section IV, infra.

have been suffered." Monsanto Chemical Co. v. Perfect Fit Mfg. Co., Inc., 349 F.2d 389,392 (2d Cir. 1965), cert. denied, 383 U.S. 942 (1966). More recently, this court has cautioned that "damages will not be awarded in the absence of credible evidence demonstrating injury to the plaintiff resulting from defendants' sales. Damage awards for lost sales...may not be based upon the assumption that a trademark infringement resulted in commercial injury." Invicta Plastics (USA) Ltd. v. Mego Corp., 523 F Supp. 619,624 (S.D.N.Y. 1981) (citations omitted); Vuitton Et Fils, S.A. v. Crown Handbags, 492 F. Supp. 1071,1077 (S.D.N.Y. 1979) ("The discretionary award of either damages or profits assumes an evidentiary basis on which

to rest such an award. Without such a basis there can be no recovery.") Moreover, assuming the required evidentiary basis, the damage recovery may serve as compensation for sales diverted from plaintiff, for damage to plaintiff's reputation, or for other harm stemming from unfair competition. Vuitton Et. Fils, S.A. v. Crown Handbags, 492 F. Supp. at 1077; Kiki Undies Corp. v. Promenade Hosiery Mills, Inc., 308 F. Supp. 489 (S.D.N.Y. 1969).

Finally, section 35 of the Lanham Act provides that "[i]n assessing damages, the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount." 15 U.S.C.

§1117; see, e.g., Louis Vuitton S.A. v. Spencer Handbags Corp., 597 F. Supp. 1186,1190 (E.D.N.Y. 1985).

Those sections of plaintiff's submissions which address damages arising from defendants' acts of infringement suggest two alternative measures of damages. In its Proposed Findings, plaintiff identified defendant Celebrity World's gross revenues of $104,037, claimed that these revenues represented its own lost revenues as a result of the defendants' acts of infringement, factored this figure to reflect its own higher subscription rates and arrived at $158,797 as its damage. (Proposed Findings ¶4). In its Supplemental Findings, plaintiff identified defendant Celebrity World's

gross revenues from subscriptions of $53,473, claimed that these revenues represented its own lost revenues as a result of the defendants' acts of infringement, factored this figure to reflect its own higher rates and arrived at $82,915[8] as it damages.

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[8]The calculations are as follows

(1) From May 1, 1985 to December 31, 1985, Celebrity World, charging $1,000 per subscription, earned $5,843. Celebrity Service, charging $1,500 per subscription during that time would have earned $8,224.50.

(2) From January 1, 1986 to December 31, 1986, Celebrity World, charging $1,000 per subscription, earned $29,951. Celebrity Service, charging $1,500 per subscription during that time would have earned $44,926.50.

(3) From January 1, 1987 to July 31, 1987, Celebrity World charging $1,000 per subscription, earned $18,039. Celebrity Service, charging $1,650 per subscription during that time would have earned $29,764.35. Thus,

$8,224.50 = $44,926.50 + $29,764.35 = $82,915.35

(CL 63) (emphasis added). In fact, during the period of its operation, defendant Celebrity World had 52 subscribers who were not subscribers of the plaintiff and it was these subscribers that provided Celebrity World with revenues from subscriptions of $53,473. (See ¶¶ 3,5, supra). This figure, as has been shown, supra, translates into lost revenues of $82,915 for the plaintiff;[9] lost revenues which this Court held in Vuitton Et Fils, S.A. V. Crown Handbags, 492 F. Supp. at 1077, may be compensated by a damage recovery.

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[9] As found in ¶ 3, supra, plaintiff would have incurred no significant expense as a result of these additional 52 subscribers.

Certain factors, however, detract from this conclusion. First and foremost, I am mindful of the requirement discussed at pages 18-19, supra, that damages must be proven by "credible evidence." Yet, no evidence was presented at the evidentiary hearing over which I presided which would support the conclusion that, but for the defendant Celebrity World's acts of infringement, all 52 of its subscribers would have subscribed to the plaintiff, in spite of the plaintiff's higher subscription rates and the presence of other competitors, however inferior their services may have been. (See ¶¶ 3 and 4, supra). Neither was any such evidence introduced at the trial before Your Honor brought to my attention. In

fact, none of the individual subscribers were produced by either party to testify as to their own motivations for subscribing to defendant Celebrity World.

Moreover, I note that Your Honor's conclusion of law, that Celebrity World's subscribers "would have otherwise subscribed to Celebrity Service in order to receive goods and services of the same nature," was adopted by Your Honor from the Plaintiff's Proposed Findings, where it appeared under the heading "Defendants are Liable for Misappropriation of Corporate Property," and not in the discussion of "Trademark Infringement and Unfair Competition." Nonetheless, bound by your finding, I recommend $82,915 as

the basis of the monetary award for plaintiff's damages from trademark infringement. Further, Your Honor has concluded, in accordance with section 35 of the Lanham Act, 15 U.S.C. § 1117, and Second Circuit authority, e.g., Deering Milliken & Co. v. Gilbert, 269 F. 2d 191,194 (2d Cir. 1959), that "[g]iven the willful, wanton and fraudulent nature of Mr. Ledes' conduct, such damages as are found hereafter are to be trebled." (FF 95). Therefore, I recommend $248,745 as plaintiff's damages from trademark infringement.

* * *

II. Defendants' Profits

Your Honor has concluded, in accordance with section 35 of the Lanham Act, 15 U.S.C. § 1117, that the

plaintiff is entitled to an award of defendants' profits. (CL 86, 89-91). However, the plaintiff has stated that "this recovery...[of defendants' profits]...overlaps with the amount awarded for trademark infringement and unfair competition. Therefore, the Court does not issue a separate award of profits." (Supplemental Findings ¶28). I agree with plaintiff's disclaimer and, having awarded $248,543.55 as damages for trademark infringement, section I.A., supra, I recommend no separate award of defendants' profits.

* * *

APPENDIX E

Celebrity Service International, Inc.

v.

Celebrity World, Inc., et al.

89 Civ. 8593 (RO)

Endorsed Memorandum

OWEN, District Judge

This inquest was referred to Magistrate Buchwald on July 29, 1987 for a "(1) an accounting of defendant Celebrity World's profits attributable to the wrongful conduct; (2) to hear and report on damages flowing from its wrongful conduct; and (3) the court having found punitive damages to be appropriate here as to both Celebrity World, Inc. and John Ledes, its Chief Executive Officer, the Magistrate is to hear and report to the court on the financial position (including assets) of each of the said defendants so that

the court may hereafter fix an appropriate amount of punitive damages as to each." The Magistrate was also directed to report on the amount of attorneys' fees to be awarded.

An evidentiary hearing was held by the Magistrate on October 20 and 21 and November 12, 1987. Before the hearing the parties submitted proposed findings and after the hearing another round of briefs was submitted. The Report and Recommendation sets forth extensive findings of fact on the claims of trademark infringement and unfair competition, misappropriation and theft of trade secrets, defamation, and tortious interference with business relations. It also makes extensive findings on the questions of defendants' profits and

punitive damages. Based on these findings and the conclusions drawn from the trial, the Magistrate recomends the following awards: (1) $82,915 for trademark infringement and unfair competition, trebled under the Lanham Act to $248,745; (2) no additional damages for misappropriation and theft of trade secrets; (3) $13,002.35 for defamation; (4) $15,000 for tortious interference with employment contracts; and (5) no separate award of defendant's profits. Finally, to aid in the Court's consideration of punitive damages, the Magistrate reports that, while defendant Celebrity World has a negative net worth of $81,438, defendant John Ledes has many assets, listed at ¶¶ 21-40 with the dates they

were transferred from his possession, if they were so transferred.

On the question of attorney fees, the Magistrate recommends that before fees and costs can be awarded, plaintiff must: (1) segregate time devoted to pursuing remedies against the other defendants and the non-party, and subtract that time from the application; (2) remove any duplications in which Mr. Bagley and Ms. Leavens both billed for digesting Mr. Ledes' deposition; (3) delete the twelve hours billed by Mr. Bagley in connection with the preparation of a default motion against Ms. Furs; (4) correct a typographical error which reports Ms. Leavens hours as 288.5 instead of the correct 188.5; and (5) delete the claim for the services of

two other law firms. Except as modified, the Magistrate recommends that plaintiff's request for attorneys' fees be adopted.

Defendants object to the report on the following grounds: (1) there is no evidence or law to support the award of $248,745 for trademark infringement and unfair competition; (2) there is no evidence or law to support the award of $13,002.35 for defamation or the award of $15,000 for tortious interference; and (3) the attorneys' fees have not been shown to be reasonable.

I have reviewed the thorough and well-reasoned report of the Magistrate and find its conclusions to be in accord with the record and findings made after trial. I do not share the

Magistrate's hesitancy in translating the fifty-two subscribers who went to defendant into damages to plaintiff. Plaintiff alone could have performed the service these subscribers sought had not Ledes deliberately misappropriated plaintiff's employees and lists, and defamed plaintiff. Therefore, clearly there is a sufficient basis to make "an educated computation of damages..." Lexington Productions, Ltd. v. B.D. Communications, 677 F. 2d 251,254 (2d Cir. 1982). I therefore reject the objections of defendants and hereby adopt the Report and Recommendation and make it the order of this court. Further, I award punitive damages in the amount of $100,000 against John Ledes. However, such award shall not-

be added to the treble damage award under the Lanham Act, discussed above, but shall be "concurrent" therewith.

In addition, the request for a supplemental award of attorney's fees is granted. I have reviewed the objections to that request and find them to be without merit. Therefore I award an additional amount of $77,929.17 as reasonable attorney fees, costs and disbursements incurred in the course of the hearing before the Magistrate on damages.

Submit order on notice.

Dated: October 27, 1988
New York, New York

ss/_____
Richard Owen
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CELEBRITY SERVICE INTERNATIONAL, INC.,

Plaintiff,

v.

CELEBRITY WORLD, INC., JOHN LEDES, ANGELA WENDKOS and ERICA FURS a/k/a ERICA KIRKLAND

Defendants.

ORDER OF JUDGMENT

WHEREAS, this Court by Orders dated July 29 and July 31, 1987, issued permanent injunctive relief in favor of plaintiff Celebrity Service International, Inc. ("Celebrity Service") against defendants John Ledes ("Ledes") and Celebrity World, Inc. ("Celebrity World"); and

WHEREAS, an evidentiary hearing on damages was thereafter held before

Magistrate Naomi Reice Buchwald on October 20 and 21 and November 21, 1987; and

WHEREAS, Magistrate Buchwald's Report and Recommendation was given to the Court, and made the Order of the Court in the Endorsed Memorandum dated October 27, 1988.

NOW IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff is awarded $248,745 (after trebling, pursuant to 15 U.S.C. § 1117) in damages arising from the intentional trademark infringement and unfair competition of defendants Ledes and Celebrity World;

that plaintiff is awarded $13,002.25 in compensatory damages arising from the intentional acts of defamation by defendants Ledes and Celebrity World;

that plaintiff is awarded $15,000 in damages for defendant's tortious interference with its employees;

that pursuant to 15 U.S.C. § 1117, plaintiff is awarded $182,215.70 for its attorneys fees, costs and disbursements incurred in pursuing its causes of action against defendants Ledes and Celebrity World;

that defendants Ledes and Celebrity World shall be jointly and severally liable for all of the foregoing awards;

that defendants Ledes is also personally liable for an award to plaintiff of $100,000 in punitive damages, said amount to be deemed "concurrent" with the compensatory damages award under 15 U.S.C. § 117; and

that in view of the foregoing, plaintiff is awarded a total money judgment of $458,962.95 jointly and severally against John Ledes, Twin Oaks, Katonah, New York 10536 and Celebrity World, Inc., 48 East 43rd Street, New York, N.Y.

Dated: New York, New York
January 3, 1989

ss/_____
Richard Owen
United States
District Judge